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No. 1157

IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

v.

SOUTHERN PACIFIC COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CIVIL APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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No. .....

In The

Supreme Court of the United States

Missouri Pacific Railroad Company,

Petitioner,

v.

Southern Pacific Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas

Petitioner, Missouri Pacific Railroad Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas entered in this cause on June 19, 1968.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas filed June 19, 1968, is reported in 430 S.W. 2d 900 and is printed *infra* as Appendix B.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas was entered on June 19, 1968 (Appendix C). The Supreme Court of Texas "refused as presenting no error requiring reversal" Petitioner's Application for Writ of Error on November 20, 1968, and overruled Petitioner's Motion for Rehearing on January 22, 1969, making final the decision of the Court of Civil Appeals (Appendix E).

The jurisdiction of this Honorable Court is invoked under 28 USC § 1257(3). The federal question presented by this Petition was the identical question and the sole question presented to the Supreme Court of Texas (Appendix D).

QUESTION PRESENTED

A railroad company's liability to its employee for personal injury is "absolute" because of such railroad company's violation of the Safety Appliance Act in using a freight car with a defective hand brake. Such railroad company settles with its injured employee. Is such railroad company entitled to be fully reimbursed in an action for indemnity against another railroad company which negligently furnished the freight car with the defective hand brake, notwithstanding that as between the two railroad companies only the one seeking indemnity was guilty of the violation of the Safety Appliance Act which gave rise to the claim?

STATUTE INVOLVED

The statute involved is what is commonly known as the Safety Appliance Act of 1910, 32 Stat. 298, 45 USC § 11-16, and specifically that portion of the Act (§ 11) which makes

it "unlawful" for any common carrier to use on its line a freight car not equipped with "efficient" hand brakes.

The above statute, to the extent relevant, is set forth as Appendix A.

STATEMENT OF THE CASE

One Liles, a brakeman in the employ of Respondent, Southern Pacific Company, received personal injuries while engaged in switching railroad cars. One car (MP4626) was owned by Petitioner, Missouri Pacific Railroad Company. The freight car MP4626 was equipped with a hand brake which was defective. Liles was injured because he could not properly stop the freight car with the hand brake. Earlier in the day, prior to Liles' injury, the freight car MP4626 with the defective hand brake had been left on an interchange track by Petitioner to be transferred to, and accepted and picked up by Respondent in accordance with the established Interchange Rules (Tr. 47-48) and customary practice in the interchange[1] and transfer of freight cars between common carriers. Respondent had accepted the freight car and was using it on its line in making up a freight train when the accident occurred. Although acknowledging that the brake was defective, and, therefore that its use of the car constituted a violation of the Safety Appliance Act, Respondent negotiated with its injured employee for over two years before finally settling with him. Prior to such settlement Respondent made demand on Petitioner to settle with the injured employee and Petitioner declined to do so because of Respondent's admitted viola-

[1] "The boundary between carriers is the place where the train is received in interchange under 49 C.F.R. 132.12 because at that point the use or haul on the line of one carrier ceases and the use or haul on the line of the other carrier commences." ICC Rules and Regulations under 49 C.F.R. 132.12 as quoted in *U. S.* v. *Akron, Canton & Youngstown RR Co.*, 397 F. 2d 139 (6th Cir. — 1968).

tion of the Safety Appliance Act, (among other reasons). After finally settling with its employee, Respondent filed this suit against Petitioner seeking full indemnity and reimbursement for the amount paid its employee in settlement. After trial before the Court without a jury, Respondent obtained judgment against Petitioner for full indemnity on the basis of the trial court's findings that Petitioner was negligent in failing to properly inspect and correct the hand brake defect while the car was in its possession. Although the trial court found Respondent not guilty of common law negligence,[2] it found that Respondent violated Section 11 of the Safety Appliance Act in using the car with a defective hand brake.

Petitioner appealed from the adverse judgment on the ground, among others, that Respondent's violation of the Safety Appliance Act precluded it from shifting its responsibility to and obtaining full indemnity from Petitioner for the amount paid Respondent's employee in settlement of his claim against Respondent under the Safety Appliance Act.

REASONS FOR GRANTING THE WRIT

1. The decision of the Texas court concerns an extremely important federal question[3] not heretofore deter-

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[2] Although exonerating Respondent of common law negligence the Court found that in addition to violating the Safety Appliance Act: "Any inspection made by T&NO's [Respondent] employees at Sinton, Texas, of the hand brake on the hopper car MP4626 was not an inspection of such character or *care* as to disclose existence of a defect then existing in the hand brake (Emphasis added) (Tr. 52).

[3] Commenting on the Federal Employers' Liability Act it was said in *Arnold* v. *Panhandle & S.F. R. Co.*, 353 U.S. 360 1 L.ed. 2d 889 at 891, 77 S. Ct. 840: 'The petitioner having asserted federal rights, it is our duty under the Act to make certain that they are fully protected, *as the Congress intended them to be.*" (Emphasis added)

mined by this Court, involving the construction and effectiveness of the Safety Appliance Act, and as such bears on the safe handling of railroad cars interchanged between common carriers and the prevention of injuries to employees and the public.

2. The decision of the Texas court reaches an erroneous result; is contrary to well settled principles of indemnity and public policy as enunciated by the Supreme Court of the United States and other courts; would seriously impair the congressional intent to impose "absolute liability" on only the railroad *using* a freight car with a safety appliance defect; would encourage litigation between railroad companies in an effort to shift responsibility to injured employees under the Safety Appliance Act and would impede and complicate the settlement of valid personal injury claims of railroad employees.

Importance of Question and Errors In Decision of State Courts

Section 11 of the Safety Appliance Act, (27 Stat. 531, as amended 32 Stat. 298, 45 USC § 11) in relevant part, provides that it shall be "unlawful" for any common carrier subject to the Act "to haul, permit to be hauled or used in its line" any car not equipped with "efficient hand brake". This is a penal as well as a remedial statute.[4] Even more important, it is essentially a safety measure as this Court and other courts have specifically stated.[5]

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[4] In 1957 the penalty was increased from $100.00 to $250.00 "for each and every such violation." (71 Stat. 352, 45 USC §13).

[5] "History showed that hundreds of workers had been injured or killed by the stopping of unbraked cars, by the operation of hand brakes, and by the use of hand couplers. This history well known to Congress, was the primary purpose behind the legisla-

Respondent's violation of the Safety Appliance Act rendered it "absolutely liable" to its injured employee without regard to Respondent's care or negligence and without regard to any negligence on the part of the employee. The duty imposed by the statute is "absolute", "unqualified" and "unconditional", and the carrier "using" such a defective freight car is not excused by any showing of care, however assiduous. *Myers* v. *Reading Co.*, 331 US 477, 482, 67 S. Ct. 1334, 91 L. ed. 1615; *Brady* v. *Terminal R. Asso.*, 303 US 10, 15, 58 S. Ct. 426, 82 L. ed. 614; *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 US 384, 70 S. Ct. 200, 94 L. ed. 187, 16 ALR 2d 646.

In permitting indemnity in this case, the Texas court completely ignores the congressional intent behind the Safety Appliance Act. Indeed, for all practical purposes, it completely ignores the Safety Appliance Act. It treats the case in terms of an ordinary common law indemnity action between joint tort feasors — speaking in terms of alleged breaches of duty as between joint tort feasors and citing Texas cases[6] having nothing to do with railroads or the

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tion. The Act, therefore, should be liberally construed as a safety measure."

U.S. v. *Seaboard Air Line Railroad Co.*, 361 U.S. 78, 4 L.ed. 2d 25, 80 S. Ct. 12

"Our view is that the obvious purpose of the Safety Appliance Act is to induce carriers to adhere to higher standards of safety in their operations by imposing a liability on interstate carriers if they do not comply with the Act. . . ."

Clark v. *Atlantic Coast Line Railroad Co.*, 244 F. 2d 368 (D. C. Cir., 1957)

"Congress . . . for its own reasons imposed extraordinary safety obligations upon railroads. . . ."

Kernan v. *Am. Dredging Co.*, 355 U.S. 426, 2 L.ed. 2d 382 at 390, 78 S.Ct. 394

[6] This case involving the construction and effect of a Federal Statute the Court need not be concerned with trying to fit the case into one of the many, confusing "indemnity semantic cubicles." Prossor *On Torts* — 3d ed. p. 278.

Safety Appliance Act. This led the Court to an erroneous result. It has been made abundantly clear that a railroad's liability for violation of the Safety Appliance Act is an independent "actionable wrong" (*O'Donnell* v. *Elgin J. & E. Ry. Co.*, 338 US 384, 70 S. Ct. 200, 94 L. ed. 187, 16 ALR 2d 646); that such liability is not imposed on a carrier for the acts of other carriers, but because of its own wrongful and "unlawful" conduct in the "use" of a car with a safety appliance defect; that it is not the mere "possession" of a car with a penalty defect which results in the liability, but it is the carrier's use of such car on its own line, *U. S.* v. *Western, etc. RR. Co.*, 297 F. 482 (D.C., Ga., 1924).[7]

It is both the right and duty of a carrier to refuse to accept a defective car at interchange if acceptance would necessarily involve its use of such car in violation of the Safety Appliance Act. *Baltimore & O.S.W. R. Co.* v. *United States*, 242 F. 420, 425 (6th Cir. — 1917); *United States* v. *Akron, Canton & Youngstown RR Co.*, 397 F. 2d 139 (6th Cir. — 1968). As stated in *United States* v. *Southern Pacific Co.*, 167 F. 699 (D.C., Cal.):

> "A company is under no obligation to receive cars defective as to safety appliances from any other railroad, and when it does so, *it must know at its peril* that each car so received is equipped with the lawful safety appliances . . . It is the use of a car in a

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[7] The Court in the cited case in considering the constitutionality of an act which would impose a penalty for the acts of others over whom it had no control said:

> "The answer avers that the statute, thus originally construed, takes the carrier's property without due process of law, in that a penalty is imposed for the acts of others over whom it had no control, . . . Had the penalty been inflicted for the possession of the defective car . . . there would be force in the contention; but the penalty is laid only on a use of the car, and that may be avoided. The very agents of the carrier who use it may, by diligence, inspect it, and are under duty to lay it aside if it be defective."

defective condition that the law seeks to prevent . . ." (Italics added).

It is significant that as between the two railroads — Petitioner and Respondent — *only* Respondent was guilty of a violation of the Safety Appliance Act. (Even assuming Petitioner was responsible for the brake defect in the first place.) The law is settled that the *entire responsibility* for a freight car with respect to a Safety Appliance Act defect rests with the railroad which is *using* the car, irrespective of ownership of the car and irrespective of the condition of the car at the time it was delivered to the carrier using it with such defect. After Respondent accepted Petitioner's freight car on the interchange track, under the terms of the Safety Appliance Act it became solely and fully responsible for any brake defect, and Petitioner was forthwith relieved of any liability it might have under the Act. *Clark* v. *Atlantic Coast Line,* 244 F. 2d 368 (D.C. Cir. — 1957); *Patton* v. *Baltimore & Ohio R. Co.,* 197 F. 2d 732 (3rd Cir. — 1952). The reason for this is obvious. The policy of the law here in imposing absolute liability on the carrier using the car with the defect is to encourage that carrier to be certain by inspection, and repair, if necessary, that the car is not used with a defective hand brake.[8] This sound and obvious policy of the law would be completely circumvented if the *only* carrier guilty of violating the Safety Appliance Act, and liable to its injured employee as a consequence thereof, was permitted to shift the entire loss to, and be

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[8] "Treating each carrier which handles a train movement independently, and compelling it to inspect for itself rather than rely on an inspection by a previous carirer is a reasonable means of promoting safety, and appears to be intended by the regulations."

United States v. *Terminal RR Assn. of St. Louis,* 397 F. 2d 467, 470, (7th Cir., 1968) cert. den'd. Dec. 9, 1968, 89 S. Ct. 447

completely reimbursed by another carrier which may have been guilty only of ordinary, common law, negligence. The clear intent of Congress to *limit* this liability to the carrier *using* the defective car would be thwarted if by circumvention, in an indemnity action, this liability is shifted to a carrier not using the defective car.

Indeed, it has been held that a carrier subject to the Safety Appliance Act may not even by contract relieve itself of its statutory liability under the Safety Appliance Act. *United States* v. *Houston Belt & Terminal Ry. Co.*, 210 F. 2d 421, 424 (5th Cir. — 1954); *Clark* v. *Atlantic Coast Line RR Co.*, 244 F. 2d 368, 372 (D.C. Cir. — 1957).

In *Chicago & N.W. Ry. Co.* v. *Davenport*, 205 F. 2d 589 (5th Cir. — 1953 Cert. Denied, 346 U.S. 873, 74 S.ct 123 98 L. ed 382) the Court even held that a written contract for indemnity would be invalid as contrary to the spirit and prohibitions of the law and not enforceable so as to permit a railroad company liable to an employee for a Safety Appliance Act violation, to be indemnified.

In cases decided before the Safety Appliance Act of 1910 the Supreme Court of the United States and the Supreme Court of Texas both held that as between two railroad companies, both of whom were guilty of common law negligence in failing to properly inspect or repair freight cars, there could be no indemnity. *Union Stock Yards Company* v. *Chicago, Burlington & Quincey Railroad Co.*, 196 U.S. 217, 25 S. Ct. 226, 49 L.ed. 453 (1905); *Galveston H. & S.A. Ry. Co.* v. *Nass*, 59 S.W. 870 (Tex.-1900). This has also been the holding of the courts since the enactment of the Safety Appliance Act. *Chicago R.I. & P.R. Co.*, v. *Chicago & Northwestern Ry. Co.*, 280 F. 2d 110 (8th Cir. — 1960) cert. denied, 81 S. Ct. 378, 364 U.S. 931, 5 L.ed. 2d 364.

A carrier guilty of the more serious offense of violating the Safety Appliance Act and thus being guilty of "unlaw-

ful", penal conduct, and negligence *per se*,[9] should not be in a more favorable position.

This was precisely the reasoning of the Court in *Lowe* v. *New York Central Ry.*, 148 F. Supp. 337 (E. D. Mich.-1957), a case directly in conflict with the holding of the Texas court in the instant case. In that case indemnity was denied to a railroad company liable because of its violation of the Safety Appliance Act. That court properly noted that "the violation of the Federal Safety Appliance Act — considered to be negligence *per se* — is certainly not a less blameworthy act than failure to use ordinary care."

See also, to the same effect, *Cush* v. *Pittsburgh Chartiers & Youghiogheny Ry. Co.*, 157 F. Supp. 360 (W.D. Penn. — 1957).

Irrespective of whether the carrier seeking indemnity is liable because of common law negligence or negligence *per se* by legislative fiat, the policy considerations are identical in both instances:

> "The very foundation and principle of public policy that denies recovedy in such cases [is that] . . . because, if that were allowed, the negligent party would be offered an inducement to relax its vigilance in the protection of those who are largely dependent upon it for their safety in the performance of hazardous duty."
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> *Galveston, H. & S.A. Ry. Co.* v. *Nass*, 59 S.W. 870 (Tex. — 1900)

To the same effect are those cases holding that violation of a state safety statute precludes the violator from ob-

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[9] ". . . it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence' — what is sometimes called 'negligence *per se*'." *Urie* v. *Thompson*, 337 U.S. 163, 189, 69 S. Ct. 1018, 93 L.ed. 1282 (1949). *Accord: San Antonio Ry.* v. *Wagner*, 241 U.S. 476, 484, 36 S. Ct. 626, 60 L.ed. 1110 (1916), *Tex. & P. R. Co.* v. *Sherer*, 183 S.W. 404 (Tex. Civ. App. — 1916, error ref'd.)

taining indemnity. This has been the reasoning of the New York Courts under comparable facts:

> "To hold otherwise would encourage disregard for the objectives of the statute. The objectives of the statute are not alone to provide remedies for laborers but more particularly to prevent accidents causing the injuries. The sanctions imposed by the statute and by the cases are necessary to compel a higher standard of care by forbidding any delegation of responsibility and any other right of recovery even against a joint tort feasor."[10]

The holding of the Texas Court in the instant case not only defeats the basic purposes of the Safety Appliance Act but would result in protracted litigation between railroad companies seeking indemnity for the consequences of their own Safety Appliance Act violation. And even worse, such holding would result in endless delays in settling valid personal injury claims under the Safety Appliance Act. If this remains the law, why should a railroad company settle with its own injured employee, even though absolutely liable under the Safety Appliance Act, when it can implead another carrier in the event a lawsuit is filed — and perhaps escape scot-free? This must have been one of the major considerations by Congress when it provided by terms of the Safety Appliance Act that liability be imposed absolutely on the carrier *using* the defective car with the defect, and only on that carrier.

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[10] *Rufo* v. *Orlando*, 309 N.Y. 345, 130 N.E. 2d 887 (1955), denying indemnity to a contractor liable to an injured person because of violation of a New York safety act.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATUTE INVOLVED

The relevant portions of the statutes involved are:

45 USCA § 11:

"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; . . ." Apr. 14, 1910, c. 160, § 2, 36 Stat. 298.

45 USCA § 12:

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 11-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. . . ." Apr. 14, 1910, c. 160, § 3, 36 Stat. 298.

45 USCA § 13:

"Any common carrier subject to sections 11-16 of this title using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of said sections not equipped as provided in said sections, shall be liable to a penalty of $250 for each and every such violation, to be recovered as provided in section 6 of this title. . . ." As amended Aug. 14, 1957, Pub. L. 85-135, § 1(2), 71 Stat. 352.

APPENDIX B

OPINION OF COURT OF CIVIL APPEALS

Affirmed, and opinion filed June 19, 1968.

No. 133

MISSOURI PACIFIC RAILROAD COMPANY,

Appellant,

v.

SOUTHERN PACIFIC COMPANY,

Appellee.

APPEAL FROM DISTRICT COURT OF HARRIS COUNTY

On September 20, 1959, Jessie Liles, a brakeman employed by Texas & New Orleans Railroad Company was injured while in the process of switching a freight car. The car being switched belonged to Missouri Pacific Railroad Company and had been delivered by its owner to Texas & New Orleans Railroad Company for transportation to its destination at a point on the latter's lines. The car, at the time of its delivery, had a defective handbrake mechanism which defect was a cause of the injury to Liles. Liles did not file suit to recover damages for his injuries but, on March 27, 1962, Texas & New Orleans Railroad Company paid him $25,000.00 in settlement of his claim. Subsequently Texas & New Orleans Railroad Company was merged into Southern Pacific Company which latter company acquired all of the rights growing out of the transaction here in question. Southern Pacific Company filed suit against Missouri Pacific Railroad Company for full indemnity or, in the alternative, for contribution. A non-jury trial resulted in a judgment for Southern Pacific Company for full in-

demnity. Missouri Pacific Company has perfected its appeal.

The parties hereto will be referred to as Missouri Pacific and Southern Pacific.

The lines of Missouri Pacific and Southern Pacific intersect at Sinton, Texas. At the point of such intersection sidetracks are maintained to be used in the interchange of cars from the trains of one company to the trains of the other. On September 20, 1959, Missouri Pacific delivered one of its cars to such transfer line to be picked up by Southern Pacific and delivered to Gregory, Texas. When the Southern Pacific train arrived shortly before midnight it coupled onto such car by heading its engine into it. It was necessary to switch the car so as to get it behind the engine. To do this the car was pushed off the sidetrack onto the main line. The engine then, with the car coupled to its front, began moving backwards. When enough speed was reached to cause the car to coast down the main line, the engine was cut loose. The engine then sped away from the rolling car and into the side track. The switch into the side track was then closed before the car got there so that the car rolled on down the main line. The intention was that, after the car had passed the switch, the engine would pull back onto the main line so that the car would be behind it.

Liles was standing at the car when the engine first coupled onto it. At the time of the coupling, Liles noticed that the wheels on the car skidded on the track, indicating that its brakes were set. He checked the hand brake by feeling of the upright brake rod. The fact that the rod felt taut indicated to him that the hand brake was set. He then released the "dog" that holds the hand brake in the set position. When he did so the wheel used in setting the

hand brakes spun to the left — again indicating to him that the hand brake had been set and had caused the wheels to skid when the coupling occurred.

After following this procedure by which Liles thought the hand brake had been released, he then bled the air from the air brake system thereby releasing the air brakes.

It is the practice, in spotting cars to be picked up later (such as was done here), to set the brakes on the spotted car. The hand brakes and the air brakes are separate, independent systems. From subsequent events it can be concluded that when this car was spotted the Missouri Pacific brakemen probably undertook to, and thought they had, set both the handbrake and the air brake. The hand brake, because of its defect, did not set, but the air brake did so and thus caused the wheels of the car to skid at the time of the coupling, as observed by Liles.

After the car was coupled to the front of the engine and its brakes released, it was Liles' job to ride it during the switching procedure. The procedure outlined above went as intended until the car on which Liles was riding had rolled past the closed switch into the side track where the engine had gone. Liles then tried to apply the hand brake to stop the car so that the engine could pull onto the main line and back into it for a coupling. The brakes, however, failed to hold. There was a slight downgrade in the direction in which the car was rolling and despite the effort of Liles to apply the brakes, the car gained speed. It was rolling in the direction of unguarded crossings in the town of Sinton. The air brake could not be used because the car was not coupled to the train. As he passed another brakeman on the ground near the sidetrack switch, Liles called to him that the brakes would not hold. The brakeman, by signals, caused the engine to come again out onto

the main line, closed the sidetrack switch and told the engineer of Liles' predicament. The engine, moving backwards, started chasing the rolling car so as to couple onto it and stop it by applying the engine brakes. Since the car, on the downgrade, was gaining speed the engine to catch it had to run at a greater speed than that at which a safe coupling should be made. When the engine reached the car the coupling was made with such force that Liles was jarred loose from his hand hold on the car, fell to the ground and received the injury for which he was paid $25,000.00 by Southern Pacific.

The evidence showed that the car in question had been in the Missouri Pacific shop at Palestine, Texas for general repairs from August 27, 1959 to September 11, 1959. Records were kept of the repairs done and there was no record of any repairs having been done to the handbrake system nor do the records show that the handbrake system was defective when the car left the shop. In fact, an employee of Missouri Pacific who had done some of the repairs on the car testified that he had tested the handbrakes before the car left and that they were not defective. There was no evidence showing how the car was used from the time it left the shop until it was, by Missouri Pacific, spotted on the transfer track at Sinton on September 20, 1959, to be picked up by Southern Pacific.

After the accident the members of the Southern Pacific crew discovered the defect in the handbrake system on the Missouri Pacific car. The handbrake was set by turning a large hand wheel at the end of and near the top of the car. Force applied to the hand wheel was, through various connecting devices, transmitted to the brakeshoes, causing them to clamp onto the car's wheels, preventing them from turning. The hand wheel was first connected to the top of a perpendicular rod. (This rod was found by Liles to be

taut when he first tested the brakes to see if they were set) As the hand wheel was turned to the right, clock-wise, it caused the perpendicular rod to pull upward. The bottom of this rod was connected to one end of a device caller a "rocker arm." To the other end of the rocker arm was attached one end of a chain. The other end of the chain was connected to the brake shoe. Thus, the transmission to the brakeshoe of the force applied to the hand wheel depended on the free movement of the rocker arm. On the car in question there was a steel beam, called an "end sill," so positioned as to prevent the movement of the rocker arm and thus prevent the effective application of the brakes.

The testimony indicates that during the time the car was in Missouri Pacific's shop, some repairs were done to the end sill on the car. One witness testified that the end sill appeared to have been freshly painted or sprayed and that some of the freshly sprayed paint got onto the adjacent parts of the car, including the wedged rocker arm. From one of the photographs received in evidence by the trial court it could have been concluded that this rocker arm was in its wedged position at the time of the spraying of the end sill.

Upon the above recited evidence the trial court found that Missouri Pacific was guilty of negligence which proximately caused the injuries to Liles in creating the defect in the handbrake, in failing to discover the defect by proper inspection, in failing to correct the defect, and in delivering the car to Southern Pacific in its defective condition. The trial court also found that Southern Pacific, through the agency of Liles, made a proper inspection of the hand brakes on the car in question and was not negligent in the manner in which it conducted the switching operations on the occasion of the accident. The trial court further found that Liles was not negligent in undertaking to switch the car under

the circumstances in question and found that the settlement made by Southern Pacific was reasonable and was made in good faith.

By points of error the appellant questions that the evidence supports the trial court's findings of fact. It was because of those points that we have felt obliged to set forth the evidence to the extent that we did. We overrule those points. We are of the opinion that the evidence which we have detailed was sufficient to support each fact finding made by the trial court. It is true, as contended by appellant, that the evidence shows, as a matter of law, that Southern Pacific was in violation of the Safety Appliance Act. 45 U.S.C.A., Sec. 11. We do not construe the findings of fact made by the trial court, however, as being inconsistent with that evidence.

Alternatively, the appellant Missouri Pacific contends that if the evidence supports the trial court's findings exonerating Southern Pacific of negligence, then Southern Pacific, in making the settlement, was acting as a mere volunteer and, as such, was not entitled to indemnity.

In the first place, the evidence, as we have noted above, conclusively established the liability of Southern Pacific to Liles as a result of the violation of the Safety Appliance Act. Secondly, Southern Pacific was not, under the circumstances, required to prove its liability to Liles as a condition to its recovery of indemnity from Missiour Pacific. After the accident Southern Pacific called on Missouri Pacific to participate in the defense or settlement of the claim. Missouri Pacific, denying any responsibility, declined to do so. By such action it waived any right to a judicial determination of liability of Southern Pacific to Liles as a condition to Southern Pacific's recovery of indemnity from it. Under those circumstances, Southern

Pacific was required to prove only that it *might* have been liable to Liles, to the extent that it was reasonable to settle with him. Gulf, Colorado & Santa Fe Ry. Co. v. McBride, (Tex. Sup. Ct.), 322 S.W. 2d 492; Mitchell's, Inc. v. Friedman, (Tex. Sup. Ct.), 303 S.W. 2d 775; Chicago, Rock Island & Pacific Ry v. United States, (7th Cir.), 220 F. 2d 939.

The brakeman, Liles, was injured on September 20, 1959. The settlement was made with him on March 27, 1962, more than two years after his cause of action against both Missouri Pacific and Southern Pacific had accrued. As against Southern Pacific, his employer, he had a cause of action under the Federal Employers Liability Act. That cause of action was governed by the three-year statute of limitations (45 U.S.C.A., Sec. 56) and was, therefore, not barred at the time of settlement. His cause of action against Missouri Pacific was, however, for common law negligence and was governed by the two-year statute of limitations. Art. 5526, V.A.T.S. Thus, at the time of the settlement, Liles' cause of action against Missouri Pacific was barred. By point of error, the appellant asserts that it may not be made liable indirectly, by indemnity, when Liles could not have, at the time of the settlement, recovered in a suit filed against it directly. We overrule this point of error.

In a number of situations where joint tort feasors cause injury to a third party, one of them may be protected by law from liability to the injured party. This situation arises when one of the tort feasors is an employer of the injured party and protected by a policy of workmen's compensation insurance. West Texas Utlities v. Renner, (Tex. Com. App.), 53 S.W.2d 451. The situation also arises where a city joint tort feasor is protected by governmental immunity. The City of Houston v. Selph, 356 S.W.2d 850, no writ hist. In those and other similar situations it has been held that the joint tort feasor is immune from liability to

the injured party and is not liable to his joint tort feasor either for indemnity or contribution. Such liability to his joint tort feasor would, by indirection, destroy the protection given him by law. We do not, however, consider the holdings in those cases applicable to this situation. In those cases the joint tort feasor from whom indemnity or contribution was sought never became liable to the injured party at all. Here Missouri Pacific did become liable to Liles. The running of the statute of limitations did not even extinguish that liability, it merely deprived him of his remedy for enforcing it. Chapman v. Mooney, 257 S.W. 1106, no writ hist.

We are of the opinion that the facts in City of San Antonio v. Talerico, (Tex. Sup. Ct.), 81 S.W. 518, are more nearly analogous. There, an individual was injured because of a defect in a sidewalk and filed suit against the city to recover damages for those injuries. More than two years after the plaintiff was injured, the city, by amended answer, impleaded the property owner who had created the dangerous condition in the sidewalk, seeking indemnity from such property owner. Thus, at the time the property owner was impleaded, the statute of limitations governing the injured party's cause of action against it had run. Nevertheless, the court held that the property owner's plea of limitation as to the city's cause of action for indemnity would not prevent the city's recovery. The court held that the city's cause of action for indemnity accrued and the statute of limitations as to it began to run when the city sustained a damage from the owner's wrongdoing.

The case of Chicago, Rock Island & Pacific Ry Co. v. United States, supra, involved facts directly parallel to those here involved. The injured party, the railroad employee, was injured on September 24, 1946. His claim against his employer under the F.E.L.A. would have been

barred in three years, on September 24, 1949. The employer settled with him on June 17, 1949, at a date when his claim against the United States under the Federal Tort Claims Act was barred by a two-year limitation. The employer railroad company filed suit for indemnity against the United States on April 16, 1951 — more than four years after the employee's injury, but less than two years after the settlement with him. The court held that the two-year limitation provided in the Federal Tort Claims Act began to run at the date of the payment to the employee, not at the date of his injury.

In Godfrey v. Tidewater Power Co., (N.C. Sup. Ct.), 27 S.E. 2d 736, a defendant was held entitled to implead a joint tort feasor to recover contribution even though limitations had run as to the injured party's cause of action against the impleaded party. The court said at p. 737, "It is true common liability to suit must have existed as a condition precedent to contribution, but it is not essential that it shall continue to subsist, or be kept alive, against all of the joint tort feasors."

As we have noted above, the trial court found, on sufficient evidence, that Msisouri Pacific negligently delivered the freight car in question to Southern Pacific in defective and dangerous condition. In doing so Missouri Pacific breached not only a duty which it owed to the brakeman, Liles, but also a special duty which it owed to Southern Pacific by virtue of the contractual relationship between the two companies. Chicago, Rock Island & Pacific Ry. Co. v. Northwestern Ry. Co., (8th Cir.), 280 F. 2d 110. In 44, Am. Jur., Railroads, Sec. 381, it is said, "Connecting railroad companies may mutually agree to transport the loaded freight cars of each other over their respective lines. Under such agreement each is under obligation to exercise due

diligence in providing reasonably safe cars for the service contemplated . . . The company neglecting this duty is liable in damages for its negligence."

It is also true that the contractual relationship between the two railroads imposed a duty on Southern Pacific to inspect the cars delivered to it. But the trial court found that there had been no breach by Southern Pacific of that duty.

In addition to those corresponding duties the two railroad companies owed to each other by virtue of their contractual relationship, each of them also owed duties to the brakeman, Liles. Missouri Pacific owed him the common law duty to exercise ordinary care to avoid injuring him. Chicago, Rock Island & Pacific Ry. Co. v. Northwestern Ry. Co., supra. Southern Pacific owed him the same common law duty and also the duties imposed by the F.E.L.A. and the Safety Appliance Act

Thus, we have a situation where each of the two railroads has breached a duty owed to Liles, imposing on them joint liability for his injury. Missouri Pacific, in addition, has breached a special duty it owed to Southern Pacific because of their contractual relationship. Southern Pacific has not breached its special duty to Missouri Pacific. Under those circumstances we hold that Southern Pacific is entitled to recover from Missouri Pacific full indemnity for the amount it paid Liles in the good faith reasonable settlement of his claim. Renfro Drug Co. v. Lewis, (Tex. Sup. Ct.), 235 S.W. 2d 609; Humble Oil & Refining Co. v. Martin, (Tex. Sup. Ct.), 222 S.W. 2d 995; Austin Road Co. v. Pope, (Tex. Sup. Ct.), 216 S.W. 2d 563; Wheeler v. Glazer, (Tex. Sup. Ct.), 153 S.W. 2d 449.

The appellant cites as the principal authority for its position Galveston, Houston & San Antonio Ry Co. v. Nass

(Tex. Sup. Ct.), 59 S.W. 870. That case is distinguishable on its own facts. There a railroad company employee, in a fact situation quite similar to the one we have here, recovered judgment against his employer for injuries resulting from defective brakes on a freight car. The employer railroad to whom the defective car had been delivered by another railroad sought to recover indemnity from the railroad company which had delivered the defective car to it. The distinguishing fact, however, is in the finding that the employer railroad company had negligently failed to inspect the car delivered to it. It, thus, breached a duty owed by it to the delivering railroad company. 44 Am. Jur., Railroads, Sec. 381.

Southern Pacific, as alternative relief, sought contribution from Missouri Pacific, pursuant to Art. 2212, V.A.T.S. The question has been raised as to whether such relief is available since the settlement of Liles was made without judgment having been taken. Our holding on the matter of indemnity makes it unnecessary for us to seek the answer to that question.

The judgment of the trial court is affirmed.

/s/ Bert H. Tunks
Chief Justice

Judgment rendered, and opinion filed June 19, 1968.

APPENDIX C

JUDGMENT OF THE COURT OF CIVIL APPEALS

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the Fourteenth Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D., 1967, present BERT H. TUNKS, Chief Justice, and Associate Justices, John M. Barron and Sam D. Johnson.

In the cause No. 133, Missouri Pacific Railroad Company, Appellant, vs. Southern Pacific Company, Appellee, from Harris County Tr. Ct. #599,249, Opinion by Tunks, CJ, the following judgment was entered on June 19, 1968:

"This cause, being an appeal from the judgment rendered and entered by the court below on November 1, 1967, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, Missouri Pacific Railroad Company, and its surety, The Aetna Casualty and Surety Company, pay all costs in this cause incurred. It is further ordered that this decision be certified below for observance."

I, RICHARD E. TISDALE, Clerk of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of said Court's judgment herein by this Court in the above entitled and number cause as appears of record in Minute Book I, Page 76.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 13th day of February A.D., 1969.

RICHARD E. TISDALE, Clerk

APPENDIX C-a

JUDGMENT OF THE COURT OF CIVIL APPEALS OVERRULING MOTION FOR REHEARING

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the Fourteenth Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D., 1967, present BERT H. TUNKS, Chief Justice, and Associate Justices, John M. Barron and Sam D. Johnson.

In the cause No. 133, Missouri Pacific Railroad Company, Appellant, vs. Southern Pacific Company, Appellee, from Harris County Tr. Ct. #599,249, Opinion by ....., the following judgment was entered on September 4, 1968:

"It is ordered that appellant's motion for rehearing be Overruled."

I, RICHARD E. TISDALE, Clerk of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of said Court's order herein by this Court in the above entitled and number cause as appears of record in Minute Book 1, Page 85.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 13th day of February A.D., 1969.

RICHARD E. TISDALE, Clerk

APPENDIX D

EXCERPT FROM APPLICATION FOR WRIT OF ERROR

Point of Error

FIRST POINT

The error of the Court of Civil Appeals in affirming the Trial Court's award of full indemnity, the Trial Court having found and SP having admitted its liability to its employee by reason of its violation of the Federal Safety Appliance Act. (Germane to First, Second, Fourth, Fifth and Seventh Assignments of Error)

APPENDIX E

CERTIFIED COPY OF ORDER OF THE SUPREME COURT OF TEXAS (Application for Writ of Error REFUSED — N.R.E.)

IN THE SUPREME COURT OF TEXAS

No. B-1163

November 20, 1968

MISSOURI PACIFIC RAILROAD COMPANY

vs.

SOUTHERN PACIFIC COMPANY

FROM HARRIS COUNTY, FOURTEENTH DISTRICT.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Missouri Pacific Railroad Company, and its surety, The Aetna Casualty & Surety Company, pay all costs incurred on this application.

No. B-1163

January 22, 1969

MISSOURI PACIFIC RAILROAD COMPANY

vs.

SOUTHERN PACIFIC COMPANY

FROM HARRIS COUNTY, FOURTEENTH DISTRICT.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 22nd day of January, 1969.

GARSON R. JACKSON, Clerk

By /s/ MRS. JEWELL SEELIGER,
Deputy.
Mrs. Jewell Seeliger

THE STATE OF TEXAS }
COUNTY OF HARRIS }

I, RICHARD E. TISDALE, Clerk of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 2 pages contain a true and correct copy of Certified copy of Order of the Supreme Court of Texas. (Application for Writ of Error REFUSED — N.R.E.) in cause No. 133, Missouri Pacific Railroad Company, APPELLANT, vs. Southern Pacific Company, APPELLEE, from Harris County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of Said Court, at Houston, this the 13th day of February, A.D. 1969.

RICHARD E. TISDALE, Clerk

APPENDIX F

No. .....

IN THE
SUPREME COURT OF THE UNITED STATES

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
v.
SOUTHERN PACIFIC COMPANY,
Respondent.

STIPULATION AS TO TRANSCRIPT OF RECORD — RULE 21

It is AGREED and STIPULATED that the certified Transcript of Record in this case for review on Writ of Certiorari under Rule 21 shall consist of the certified Transcript of Record as filed in the Court of Civil Appeals for the Fourteenth Supreme Judicial District, Houston, Texas, and in the Supreme Court of Texas in this cause, together with certified copy of Petitioner's Application for Writ of Error filed in the Court of Civil Appeals and in the Supreme Court of Texas and certified copies of Orders of the Supreme Court of Texas in this cause on Petitioner's Application for Writ of Error and Motion for Rehearing of the Petitioner's Application for Writ of Error. The Statement of Facts (transcript of testimony) may be omitted as unnecessary for determination of the Petition for Writ of Certiorari. The parties agree that for purpose of the Petition for Writ of Certiorari in this cause the facts

may be considered as determined by the trial court and as set forth in such court's findings of fact constituting a part of the Transcript of Record.

DATED February 25, 1969.

/s/ BEN G. SEWELL
Attorney for Petitioner
Missouri Pacific Railroad Company

/s/ JOHN F. HEARD
Attorney for Respondent
Southern Pacific Company

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1157

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1157

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

OPINION BELOW

The opinion of the Texas Court of Civil Appeals (Appendix B of Petition) is reported at 430 S.W. 2d 900. The Supreme Court of Texas "refused as presenting no error requiring reversal" Petitioner's application for writ of error on November 20, 1968 and overruled Petitioner's motion for rehearing on January 22, 1969. (Appendix E of Petition.)

JURISDICTION

Petitioner seeks to invoke jurisdiction under 28 U.S.C. § 1257(3). Respondent asserts herein that no federal question is presented.

QUESTIONS INVOLVED

1. The case presents no federal question within the jurisdiction of this Honorable Court.

2. The judgment of the Texas Court of Civil Appeals correctly applied a well-settled Texas rule of indemnity.

STATEMENT

The statement by Petitioner (pp. 3-4) is substantially correct and we will not extend this brief by repetition. However, we emphasize that the Courts below found Petitioner negligent in creating the brake defect in question and in failing to discover the defect and correct it before delivery to Respondent. (Tr. 43) Moreover, it was established that Respondent had made a proper inspection of the brake in question. (Tr. 43)

REASONS FOR NOT GRANTING THE WRIT

1. *The case presents no federal question.* Under the guise that a construction of the Safety Appliance Act is involved Petitioner seeks to create the illusion that there is a jurisdictional basis for certiorari in this case. This is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous.

This case does not involve a construction or an application of the Safety Appliance Act. It simply involves the question of whether under Texas law Respondent was under principles of tort law entitled to indemnity for the amount paid its employee in a settlement situation in which:

(1) Petitioner's repair forces rendered a freight car brake non-operative and negligently failed to discover its condition before delivering the car to Respondent.

(2) Respondent without knowledge of the defect and after proper inspection switched the car without negligence but in technical violation of the Safety Appliance Act.

(3) Respondent's employee Liles sustained serious injury due to the defective brake and thereafter entered into a fair and reasonable settlement with Respondent after Petitioner's refusal to participate on any basis.

Respondent's case is patterned on the guidelines established by the landmark case of *Chicago & N.W. Ry.* v. *Chicago, Rock Island & P. Ry.*, 179 F. Supp. 33 (D.C., Iowa 1959), affirmed 280 F. 2d 110 (8th Cir., 1960). (Hereinafter referred to as *Rock Island.*)

Rock Island was identical in principle to the case at hand but resulted in an award of contribution instead of indemnity because:

(1) In *Rock Island* the receiving carrier was found guilty of improper inspection. Here Respondent was found to have made a proper inspection and was acquitted of common law negligence.

(2) Under Iowa law in *Rock Island* the fact findings dictated the allowance of contribution whereas here under Texas law the fact findings dictate the allowance of full indemnity.

In *Rock Island* both parties petitioned this Honorable Court for certiorari. Both petitions were denied. 364 U.S. 931, 81 S. Ct. 378 (Causes 491 and 525) (1961).

In approaching the question of whether indemnity or contribution would lie in *Rock Island* the lower court referred to the well-settled rule that local state law as distinguished from federal law controlled:

> "It is well settled that the law of the place of the commission of the tort which gives rise to a claim for indemnity or contribution is the applicable law. * * * It seems clear that even though liability was bottomed on and existed because of the Federal Employers' Liability Act, the right to indemnity or contribution is nevertheless governed by the applicable state law. Ft. Worth & Denver Railway Co. v. Threadgill, 5th Cir., 1955, 228 F. 2d 307, 312." 179 F. Supp. 33, 39.

In *Threadgill* the Court said:

> "The railroad's right to indemnity or to contribution, which it seeks in the alternative, is determined by state law." 228 F. 2d 307, 312.

2. *The Texas Court of Civil Appeals correctly applied a well-settled rule of indemnity law formulated by the Supreme Court of Texas in joint tortfeasor situations.* *Humble Oil & Refining Co.* v. *Martin,* 222 S.W. 2d 995 (Tex. 1949); *Austin Road Co.* v. *Pope,* 216 S.W. 2d 563 (Tex. 1949); and *Wheeler* v. *Glazer,* 153 S.W. 2d 449 (Tex. 1941). In the *Threadgill* case, cited above, the Court of Appeals for the Fifth Circuit summarized the test involved:

> "Under Texas law, the right of one tortfeasor to indemnity from another is not now determinable by the old test of misfeasance and non-feasance, but instead turns upon the issue of whether one of the defendants breached a duty of care owed by him to another defendant, in addition to or co-existent with his primary duty owed to the plaintiff." 228 F. 2d 307, 312.

In the case at hand the Courts below agree that indemnity should lie under this test. Justice requires such a conclusion when the record establishes that:

1. Petitioner negligently created the insiduous brake defect in its own car during repairs at its shop in Palestine,

Texas. In so doing it created a trap which almost caused the death of an innocent switchman and which could have caused injury or death to other employees of Respondent as well as serious damage to the property of Respondent and to the persons and property of members of the public. (Tr. 43)

2. Petitioner negligently failed by proper inspection to discover and correct the defect even though it used the car in violation of the Safety Appliance Act for about two weeks prior to the accident. (Tr. 43) In the dark of night it delivered the car to Respondent knowing that the car would be switched and hauled by Respondent's employees on Respondent's lines.

3. Respondent made a proper inspection of the car, exercised due care in picking it up from Petitioner and in switching it during the few minutes it had possession before the accident. (Tr. 43)

Under the undisputed facts Petitioner most certainly violated duties owed to Respondent's employee and to Respondent which proximately caused their respective damages and while it can be said that Respondent under the Safety Appliance Act violated a rule owed to its employee Liles by briefly hauling a car equipped with a defective hand brake on its line, Respondent did not violate any duty owed to Petitioner. Hence under Texas law Respondent was entitled to full indemnity.

We will not extend this brief by reply to the so-called "public policy" arguments advanced by Petitioner. It is anomalous that Petitioner should place great emphasis on the brief technical violation (a few minutes) by Respondent of the Safety Appliance Act when in fact Petitioner had itself just completed about two weeks' violation of the Act, undetected by its own inspectors and by the Interstate

Commerce Commission. Petitioner's suggestion that the holding here would result in endless delay in the settlement of valid personal injury claims under the Safety Appliance Act has no foundation. The record in this case is to the contrary. Respondent followed not only a just course but also a prudent course and settled with its employee without litigation. *It was not until this had been accomplished that Respondent pursued its remedy at law against Petitioner.* The result reached here is a just one and should not be disturbed. To do so would allow Petitioner, *the creator of the defective brake,* to "escape scot-free".

CONCLUSION

The petition for writ of certiorari should not be granted. This case does not involve a federal question and the Courts below have accurately and justly applied prevailing principles of Texas law.

.....

TOM M. DAVIS
Counsel for Respondent

CERTIFICATE OF SERVICE

Copies of this Brief in Opposition have been forwarded to Mr. Ben G. Sewell, Attorney for Petitioner, this 15 day of April, 1969.